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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOSE MARTINEZ HIGH,

Petitioner,

vs.

WALTER ZANT, WARDEN,

Respondent.

HEATH A. WILKINS,

Petitioner,

vs.

STATE OF MISSOURI,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT AND TO THE SUPREME
COURT OF THE STATE OF MISSOURI

BRIEF OF THE AMERICAN SOCIETY FOR ADOLESCENT PSYCHIATRY AND THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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Question Presented for Review

1. Is the execution of an individual who was under the age of 18 at the time he or she committed a capital offense cruel and unusual punishment in violation of the Eighth Amendment?

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INTEREST OF AMICI CURIAE

The American Society for Adolescent Psychiatry and the American Orthopsychiatric Association file this brief as *amici curiae* in support of petitioners by written consent of all parties, pursuant to Rule 36.2 of the Rules of this Court. We are informed that parties' letters of consent are on file with the Clerk.

The American Society for Adolescent Psychiatry ("ASAP") (S. Dion Smith, M.D., President) was founded in 1967 and today has approximately 1,400 members. ASAP provides a national forum for adolescent psychiatry and promotes the exchange of psychiatric knowledge about adolescents. Since its founding, ASAP has supported research on the normal development, as well as the psychopathology and treatment, of adolescents, helped to broaden knowledge and understanding of the various factors that may influence adolescent development and substantially improved the psychiatric community's ability to recognize and diagnose psychiatric problems common in adolescents. Half of ASAP's members are child psychiatrists, while the remaining members are general psychiatrists and psychoanalysts who maintain an active professional interest in adolescents. Its members work with adolescents in hospitals, schools and psychiatric clinics around the country as well as within the nation's juvenile court system.

The American Orthopsychiatric Association ("Ortho") (Bernice Weissbourd, M.A., President) was established in 1924 and has traditionally been concerned with the problems, causes, treatment and prevention of psychiatric disturbances. It is an organization comprised of more than 10,500 members representing a variety of mental health-related professions — psychiatry, psychology, psychiatric nursing, social work, education and the law — including experts in adolescent development. With its broad-based membership, Ortho has consistently helped to shape public policy in the mental health and human development field from varying professional perspectives.

Amici sponsor a wide array of educational programs for their members and other mental health professionals. In addition, each *amicus* publishes a scientific journal.

Amici are organizations with extensive background and experience in adolescent development. This brief is intended to provide the Court with relevant data that will enable it to judge

the critical issue herein effectively, fairly and with greater knowledge of adolescents' developmental capabilities. Adolescents are developmentally different from adults. Accordingly, *amici* strongly urge the Court to spare adolescents the imposition of capital punishment.

SUMMARY OF ARGUMENT

The law has historically recognized that adolescents differ intellectually and emotionally from adults, and therefore deserve to be judged and treated differently. This view is confirmed by a vast body of clinical research and literature. Psychiatrists and psychologists have demonstrated that adolescents have not yet developed many of the psychological, cognitive and emotional characteristics of mature adults. Adolescents tend to be less mature, more impulsive and less capable of controlling their conduct and thinking in terms of long-range consequences. Adolescence is a stage of human development in which one's character and moral judgment are incomplete and still undergoing formation. An adolescent's character structure is more flexible than an adult's and remains open to major modifications. (Point I)

Adolescents who commit capital offenses typically suffer from a variety of serious disturbances which inhibit their natural development. They come from chaotic families, have been exposed to extreme violence, suffer severe cognitive limitations, and frequently have long-standing psychiatric and neurological problems. These factors tend to exacerbate the existing vulnerabilities of youth and place an adolescent at extreme risk for seriously violent behavior. The findings of a recently completed study of persons on death row who committed capital offenses in their adolescence are consistent with this general understanding about youthful offenders. Heath Allen Wilkins exhibits all of the characteristics typical of this distinct subgroup. Jose Martinez High has never been afforded a comprehensive psychiatric and neurological examination. It is reasonable to expect that a thorough evaluation of Jose would reveal the same type of abnormalities found in all other adolescents on death row. (Point II)

The Eighth Amendment forbids the infliction of cruel and unusual punishment. Punishment is inherently cruel and unusual if it is disproportionate to the crime or to the offender's moral culpability for that crime, or if it fails to make any measurable

contribution to acceptable goals of punishment. As applied to adolescents, capital punishment is both disproportionate and makes no measurable contribution to acceptable goals of punishment. It is disproportionate as applied to youthful offenders because youths, given their incomplete psychological and emotional development, are less culpable than adults for their offensive acts. The death penalty is also contrary to the only legitimate aims of punishing the young: rehabilitation and treatment. Finally, in light of contemporary human understanding about adolescents generally and adolescents who commit capital offenses in particular, the death penalty as applied to adolescents is contrary to contemporary standards of decency. Execution of adolescents is therefore inherently cruel and unusual in violation of the Eighth Amendment. (Point III)

ARGUMENT

I

PSYCHIATRISTS, PSYCHOLOGISTS AND OTHER ADOLESCENT DEVELOPMENT EXPERTS RECOGNIZE THAT ADOLESCENCE IS A TRANSITIONAL PERIOD BETWEEN CHILDHOOD AND ADULTHOOD IN WHICH YOUNG PEOPLE ARE STILL DEVELOPING THE COGNITIVE ABILITY, JUDGMENT AND FULLY FORMED IDENTITY OR CHARACTER OF ADULTS

The law has always recognized that adolescents differ intellectually and emotionally from adults, and therefore deserve to be judged and treated differently.¹ As this Court said:

[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment" expected of adults.

¹ Examples of this different treatment include limitations on youths' rights to vote, contract, serve as jurors, purchase liquor, marry, drive motor vehicles, enlist in the armed services, or accept employment. See generally F. Zimring, *The Changing Legal World of Adolescence* (1982).

Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982) (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)). This view is confirmed by a vast body of clinical research and literature.²

Psychiatrists, psychologists and other child development experts have demonstrated that adolescents are at a stage of development in which they lack the cognitive ability,³ judgment and fully-formed identity or character of adults. "[A]dolescence is the transitional period between childhood and adulthood. It begins with the biological events of puberty and continues through a complex series of psychological and sociocultural events and influences to the establishment of an independently functioning person."⁴ Age 18 is a conservative estimate of the dividing line between adolescence and adulthood. Many of the psychological and emotional changes that an adolescent experiences in maturing do not actually occur until the early 20s.⁵

² See, e.g., Brunstetter & Silver, *Normal Adolescent Development*, in 2 *Comprehensive Textbook of Psychiatry* 1608 (H. Kaplan & B. Sadock 4th ed. 1985); Hamburg & Wortman, *Adolescent Development and Psychopathology*, in 2 *Psychiatry* ch. 4 (J. Cavenar ed. 1985); *Handbook of Clinical Child Psychology* (C. Walker & M. Roberts eds. 1983); M. Lewis, *Clinical Aspects of Child Development* (2d ed. 1982); S. Ambron, *Child Development* (3d ed. 1981); P. Mussen, J. Conger & J. Kagan, *Child Development and Personality* (5th ed. 1979); M. Rutter, *Changing Youth in a Changing Society* (1979); Graham & Rutter, *Adolescent disorders*, in *Child Psychiatry: Modern Approaches* 407 (M. Rutter & L. Hersov eds. 1977).

³ Cognition refers to the processes involved in perception, memory, reasoning, reflection, and insight. P. Mussen, J. Conger & J. Kagan, *supra* note 2, at 233-34.

⁴ Brunstetter & Silver, *supra* note 2, at 1608.

⁵ See, e.g., Hammar, *Adolescence*, in 1 *Practice of Pediatrics* ch. 4, at 1 (V. Kelley ed. 1987) (adolescent growth and development occurs from age 10 through age 20); Brunstetter & Silver, *supra* note 2, at 1608 ("most adolescents cannot be shown to have reached the stage of formal reasoning by the end of high school"); Hamburg & Wortman, *supra* note 2, at 8 (an adolescent does not develop autonomy, a sense of self and a sense of identity until his or her early 20s); Rest, Davison & Robbins, *Age Trends in Judging Moral Issues: A Review of Cross-sectional, Longitudinal, and Sequential Studies in the Defining Issues Test*, 49 *Child Development* 263, 276-77 (1978) (development of moral judgment continues throughout a person's early 20s); Kohlberg & Gilligan, *The Adolescent as a Philosopher: The Discovery of the Self in a Postconventional World*, *Daedalus* 1051, 1065, 1072 (Fall 1971) (development of formal reasoning and principled moral judgment continues into a person's early 20s).

(footnote continued)

An adolescent's intellectual growth is incomplete and his or her reasoning skills and logic are immature. From a cognitive perspective, adolescents are in the process of moving from "concrete operational thought" to "formal operational thought."⁶ An adolescent begins to consider the possible as well as the actual.⁷ These new cognitive skills develop continuously and "most adolescents cannot be shown to have reached the stage of formal reasoning by the end of high school."⁸ Formal, abstract reasoning is a complex ability that is influenced by training and experience.⁹ Therefore, although adolescents begin to acquire a broader awareness, they lack the judgment necessary to choose carefully among various possibilities and to appreciate the future consequences of their actions.

Behaviorally, the effects of an adolescent's developing cognitive ability include increased impulsiveness, experimentation and risk-taking. An adolescent's newly forming capacity to reason abstractly, coupled with his or her "fascination with the possible," results in a desire to explore various behaviors.¹⁰ However, because of an adolescent's limited experience and lack of ability to assess future consequences, he or she is unable to conceptualize realistically the potential negative outcomes of certain actions. This difficulty contributes to a young person's feelings of invulnerability to personal risk.¹¹ Hence adolescents often engage in alcohol and drug use/abuse, sexual experimentation, reckless use of motor vehicles and other potentially destructive behaviors.¹²

Traditionally, our society, through our legal system, has chosen age 18 as the dividing line between adolescence and adulthood. See, e.g., *Thompson v. Oklahoma*, ___ U.S. ___, 108 S.Ct. 2687, 2701-02 (1988) (appendices listing state statutes that set age 18 as the minimum voting age and the minimum age for jury service). Psychiatrists and psychologists consider this a reasonable choice. See Hamburg & Wortman, *supra* note 2, at 3.

⁶ Cognitive capacity develops in a sequence of stages. Jean Piaget is credited with documenting this growth and providing the terminology for these stages. See B. Inhelder & J. Piaget, *The Growth of Logical Thinking from Childhood to Adolescence* (1958); H. Ginsburg & S. Oppen, *Piaget's theory of intellectual development* (1969).

⁷ See, e.g., S. Ambron, *supra* note 2, at 432-33.

⁸ Brunstetter & Silver, *supra* note 2, at 1608.

⁹ *Id.*

¹⁰ Irwin & Millstein, *Biopsychosocial Correlates of Risk-Taking Behaviors*, *J. Adolescent Health Care*, Vol. 7, No. 6S, 82S, 87S (November 1986 Supplement).

¹¹ *Id.* at 87S.

¹² *Id.* at 82S; see also Goleman, *Teen-Age Risk-Taking: Rise in Deaths Prompts* (footnote continued)

Furthermore, researchers studying adolescent suicide have documented that adolescents tend not to appreciate fully the possibility, and finality, of death.¹³ If they consider death at all, it is viewed as something that happens to elderly people, not teenagers. Many adolescents who attempt suicide may not really believe that death will occur. In fact, they may view a suicide attempt as nothing more than a form of running away, without any consideration of their own mortality.¹⁴

Adolescent cognitive development is also characterized by a high degree of egocentrism. An adolescent "assumes that other people are as obsessed with his behavior and appearance as he is himself. It is this belief that others are preoccupied with his appearance and behavior that constitutes the egocentrism of the adolescent."¹⁵

Moreover, adolescents come to regard themselves, and their own feelings, as particularly special and unique. This belief further contributes to an adolescent's lack of understanding regarding death. An adolescent's sense of specialness becomes a conviction of his or her immortality.¹⁶ Adolescent egocentrism thus results in a general impairment of adolescent judgment.

Adolescence is also a period during which youths struggle to develop a certain measure of independence and personal identity or character.¹⁷ An adolescent engages in this developmental task

New Research Effort, N.Y. Times, Nov. 24, 1987, at C1, col. 1 ("[T]eenagers are notoriously reckless. Research suggests a combination of hormonal factors, an inability to perceive risks accurately and the need to impress peers help explain this.")

¹³ Sheras, *Suicide in Adolescents*, in *Handbook of Clinical Child Psychology* 759, 769-70 (C. Walker & M. Roberts eds. 1983).

Adolescent suicide and suicide pacts among teenagers have become a growing national concern. See, e.g., Barron, *Suicide Rates of Teenagers: Are Their Lives Harder to Live?*, N.Y. Times, April 15, 1987, at C1, col. 5. Suicide is reported to be the third leading cause of death for teenagers. Sheras, *supra*, at 769.

¹⁴ Sheras, *supra* note 13, at 769; Miller, *Adolescent Suicide: Etiology and Treatment*, in *Adolescent Psychiatry* 327, 329 (S. Feinstein, J. Looney, A. Schwartzberg & A. Sorosky eds. 1981).

¹⁵ Elkind, *Egocentrism in Adolescence*, 38 *Child Development* 1025, 1029-30 (1967) (emphasis in original ~~deleted~~).

¹⁶ *Id.* at 1030-31.

¹⁷ See generally E. Erikson, *Identity: Youth and Crisis* (1968); E. Erikson, *Childhood and Society* (1963); P. Mussen, J. Conger & J. Kagan, *supra* note 2.

in a number of ways,¹⁸ such as trying out various roles, separating from his or her parents, and seeking affirmation from a peer group. Throughout this process, adolescents remain emotionally dependent on other people.¹⁹ They are vulnerable to influences from both parents and peers, and are less capable of independent, self-directed action than adults. While striving to be independent, adolescents still need the guidance and support of responsible, caring adults. The character structure of adolescents, though developing, remains in flux and does not represent the final level of maturity found in adults. Adolescents are by nature capable of significant and spontaneous change.²⁰

Normal adolescence is no longer considered necessarily a time of extreme emotional turmoil.²¹ Adolescence is, however, generally characterized by emotionality rather than rationality. Adolescents tend to show a special intensity of feeling and tend to seek out emotional experiences. Moreover, it has been demonstrated consistently that "adolescents experience a greater fluctuation of mood than adults."²²

¹⁸ It is understandable that many adolescents must struggle to develop a personal identity. In addition to the changes adolescents experience in how they think, they also undergo vast physiological and hormonal changes. Adolescents are faced with rapid increases in height, changing bodily dimensions, and physical and psychological changes related to sexual maturation. All of these changes threaten an adolescent's sense of self. See M. Lewis, *supra* note 2, at 263-66.

¹⁹ "[T]he transition from childhood into adolescence is marked more by a trading of dependency on parents for dependency on peers rather than straightforward and unidimensional growth in autonomy." Steinberg & Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 *Child Development* 841, 848 (1986).

²⁰ For example, young people can later overcome features of an antisocial personality that appear during adolescence. For this reason the diagnosis of antisocial personality cannot be applied until an individual has reached 18 years of age. See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 342 (3d ed. rev. 1987).

²¹ See, e.g., M. Rutter, *supra* note 2, at 235-38; Rutter, Graham, Chadwick & Yule, *Adolescent Turmoil: Fact or Fiction?*, 17 *J. Child Psychology & Psychiatry* 35 (1976); D. Offer & J. Offer, *From teenage to young manhood: a psychological study* (1975).

Daniel Offer's work has suggested that adolescents who experience the greatest inner turmoil are of lower socioeconomic status, and come from families with overt marital conflicts and a history of mental illness. See D. Offer, *The Psychological World of the Teenager* (1969).

²² Hamburg & Wortman, *supra* note 2, at 11.

Finally, adolescents lack the capacity for mature, principled moral judgment which is characteristic of normal adult thought. Moral judgment emerges through the maturation process as a result of cognitive and emotional growth and an adolescent's interaction with his or her environment. An adolescent lacks a fully formed value system against which to evaluate his or her behavior and decisions. "[L]arge groups of moral concepts and ways of thought only attain meaning at successively advanced ages and require the extensive background of social experience and cognitive growth."²³

Adolescents must undergo an array of significant changes prior to adulthood. Before these many developmental tasks are achieved, adolescents are vulnerable in a variety of ways. They have difficulty appreciating the future consequences of their acts, generally lack mature judgment, are easily influenced by family members and peers and often engage in experimentation and risk-taking. Adolescents tend to be guided by emotions rather than reason. Furthermore, adolescents lack a fully formed identity or character, and generally do not have the capacity for principled moral judgment.

Adolescence is a critical developmental stage through which young persons must pass prior to entering adulthood. The clinical literature confirms what we all generally know and what the law has always recognized — adolescents are not adults. Adolescents are less capable and less responsible than adults, and more in need of protection and support.

II

ADOLESCENTS WHO COMMIT MURDER SUFFER FROM SERIOUS PSYCHOLOGICAL AND FAMILY DISTURBANCES WHICH EXACERBATE THE ALREADY EXISTING VULNERABILITIES OF YOUTH

Adolescents who commit murder typically suffer from a variety of serious disturbances which inhibit their natural growth and

²³ Kohlberg, *The Development of Children's Orientations Toward a Moral Order*, 6 *Vita humana* 11, 30 (1963). See Rest, Davison & Robbins, *supra* note 5, at 276-77; Kohlberg & Gilligan, *supra* note 5, at 1072; Kohlberg, *Development of Moral Character and Moral Ideology*, in *Review of Child Development Research* 383, 402 (M. Hoffman & L. Hoffman, eds. 1964).

development. It is well established that these disturbances, acting in combination, exacerbate the already existing vulnerabilities of youth and place an adolescent at extreme risk for seriously violent behavior.²⁴

Psychiatrists and psychologists have learned that adolescents who commit murder frequently come from families that are extremely chaotic and fail to provide the necessary support and direction for their children.²⁵ Furthermore, adolescents who commit murder almost invariably have a family background that includes extreme physical abuse and intrafamily violence.²⁶ Many homicidal adolescents have also been sexually abused.²⁷

These young people then are often victims of, and witnesses to, significant violence during their childhood and adolescence. The violence is often sustained, repetitive, and characterized by extraordinary brutality and sadism.²⁸ Their family environment

²⁴ See generally Cornell, Benedek & Benedek, *Characteristics of Adolescents Charged with Homicide: Review of 72 Cases*, *Behavioral Sciences & the Law*, Vol. 5, No. 1, at 11 (1987); Cornell, Benedek & Benedek, *Juvenile Homicide: Prior Adjustment and a Proposed Typology* (paper presented at the American Psychiatric Association Annual Meeting, Washington, D.C.) (1986); *The Aggressive Adolescent: Clinical Perspectives* (C. Keith ed. 1984); M. Rutter & H. Giller, *Juvenile Delinquency: Trends and Perspectives* (1983).

²⁵ See, e.g., Ratner, *A Case of Child Abandonment - Reflections on Criminal Responsibility in Adolescence*, 13 *Bull. Am. Acad. Psychiatry Law* 291 (1985); Haizlip, Corder & Ball, *The Adolescent Murderer*, in *The Aggressive Adolescent: Clinical Perspectives* 126, 129-34 (C. Keith ed. 1984); M. Rutter & H. Giller, *supra* note 24, at 180-91; Corder, Ball, Haizlip, Rollins & Beaumont, *Adolescent Parricide: A Comparison with Other Adolescent Murder*, 133 *Am. J. Psychiatry* 957 (1976).

²⁶ See, e.g., Haizlip, Corder & Ball, *supra* note 25, at 130-34; Straus, *Family Training in Crime and Violence*, in *Crime and the Family* 164, 183 (A. Lincoln & M. Straus eds. 1985); Sendi & Blomgren, *A Comparative Study of Predictive Criteria in the Predisposition of Homicidal Adolescents*, 132 *Am. J. Psychiatry* 423, 427 (1975); Silver, Dublin & Lourie, *Does Violence Breed Violence? Contributions from a Study of the Child Abuse Syndrome*, 126 *Am. J. Psychiatry* 404, 407 (1969).

²⁷ See, e.g., Haizlip, Corder & Ball, *supra* note 25, at 130-34; Straus, *Domestic Violence and Homicide Antecedents*, *Bull. N.Y. Acad. Med.*, Vol. 62, No. 5, at 446 (1986); Sendi & Blomgren, *supra* note 26, at 427.

²⁸ See, e.g., Lewis, Shanok, Pincus & Glaser, *Violent Juvenile Delinquents: Psychiatric, Neurological, Psychological, and Abuse Factors*, 18 *J. Am. Acad. Child Psychiatry* 307, 315-18 (1979); Sendi & Blomgren, *supra* note 26 at 427.

is one in which violence is portrayed as the ultimate problem-solver. The use of physical aggression is considered an acceptable way of dealing with others.²⁹

This systematic exposure to violence affects a young person in a number of ways. First, violence becomes a style of behavior against which a child or adolescent is apt to model his or her own behavior. Second, the persistent abuse engenders deep-seated feelings of rage which are often acted upon against other people.³⁰ Finally, a child who is physically battered can suffer significant trauma to the brain which results in increased impulsivity and volatility.³¹

Adolescents who commit murder also frequently have severe cognitive limitations. They tend to be intellectually immature and educationally deficient. These adolescents have significant impairments in judgment and are unable to perceive the consequences of their actions. These cognitive limitations are often linked to learning disabilities and neurological damage. Homicidal aggression in adolescents is also strongly associated with psychiatric problems.³²

Together, these factors — exposure to violence, cognitive limitations, and psychiatric and neurological problems — exacerbate

²⁹ See, e.g., Straus, *Family Training in Crime and Violence*, *supra* note 26, at 182-84; Lewis, Shanok, Grant & Ritvo, *Homicidally Aggressive Young Children: Neuropsychiatric and Experiential Correlates*, 140 Am. J. Psychiatry 148 (1983).

³⁰ See, e.g., Straus, *Family Training in Crime and Violence*, *supra* note 26, at 182-84; Haizlip, Corder & Ball, *supra* note 25, at 130; Lewis, Shanok, Grant & Ritvo, *supra* note 29, at 152-53; Paperny & Deisher, *Maltreatment of Adolescents: The Relationship to a Predisposition Toward Violent Behavior and Delinquency*, *Adolescence*, Vol. 18, No. 71, at 499 (Fall 1983); Silver, Dublin & Lourie, *supra* note 26, at 407; see also M. Wolfgang & F. Ferracuti, *The Subculture of Violence: Towards an Integrated Theory in Criminology* 160 (1967) ("aggression is a learned response, socially facilitated and integrated").

³¹ See, e.g., Lewis, Moy, Jackson, Aaronson, Restifo, Serra & Simos, *Biopsychosocial Characteristics of Children Who Later Murder: A Prospective Study*, 142 Am. J. Psychiatry 1161, 1165-66 (1985); Lewis, Shanok, Grant & Ritvo, *supra* note 29, at 152-53; Lewis, Shanok, Pincus & Glaser, *supra* note 28, at 314; Bender, *Children and Adolescents Who Have Killed*, 116 Am. J. Psychiatry 510 (1959).

³² See, e.g., Lewis, Shanok, Pincus & Glaser, *supra* note 28, at 313-18.

the already existing vulnerabilities of normal adolescence. Added to a normal adolescent's generally limited ability to appreciate the consequences of his or her actions and to take into account societal values in choosing a course of action, an adolescent who kills is handicapped further by impairment in cognitive ability. Added to a normal adolescent's susceptibility to the influence of family members and peers, an adolescent who kills is surrounded by an atmosphere of violence in which the norm not only tolerates but encourages violence and trivializes its consequences. And finally, added to the emotionality and egocentrism of adolescence, an adolescent who kills is often afflicted with neuropsychiatric disorders which further heighten already intensified emotions and which can create serious misperceptions concerning the relationship between himself or herself and the external world.

A. A Study of Adolescents on Death Row Confirms Their Seriously Impaired Development

In the only clinical study of individuals on death row in the United States who committed capital offenses when they were under the age of 18, researchers have found that as a group these juveniles suffer from the neuropsychiatric, psychoeducational and family disturbances generally characteristic of adolescents who commit homicide (the "Study").³³

The 14 subjects of this interdisciplinary study consisted of all adolescents sentenced to death in four states. They were selected for

³³ Lewis, Pincus, Bard, Richardson, Prichep, Feldman & Yeager, *Neuropsychiatric, Psychoeducational and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 Am. J. Psychiatry 584 (1988) (This study was originally presented as a paper at the 34th Annual Meeting of the American Academy of Child and Adolescent Psychiatry, October 1987.)

The authors of the Study are: Dorothy Otnow Lewis, M.D., Professor of Psychiatry, New York University School of Medicine, Clinical Professor of Psychiatry, Yale University Child Study Center; Jonathan H. Pincus, M.D., Professor and Chairman of the Department of Neurology, Georgetown University; Barbara Bard, Ph.D., Professor of Special Education, Central Connecticut State University; Ellis Richardson, Ph.D., Research Associate Professor of Psychiatry, New York University School of Medicine; Leslie Prichep, Ph.D., Associate Professor of Psychiatry, New York University School of Medicine; Marilyn Feldman, M.A. in Psychology; and Catherine Yeager, M.A., Research Assistant, Department of Psychiatry, New York University School of Medicine.

the study solely on the basis of their age at the time of the capital offense. They are therefore reasonably believed to be representative of the adolescent offender death row population as a whole.³⁴

The subjects were given comprehensive psychiatric, psychological, neurological, educational and electroencephalographic examinations. The psychiatric examination consisted of a thorough interview covering topics such as medical history, history of neuropsychiatric symptoms, and family and social history, including history of physical and sexual abuse. Careful mental status examinations³⁵ were performed, and detailed neurological histories were obtained by a psychiatrist and a neurologist. Additionally, any historical evidence of central nervous system trauma was corroborated through physical examinations, record reviews, and specialized tests such as the electroencephalogram. Finally, a standard neurological examination was conducted and a battery of psychological, neuropsychological, and educational tests was administered.³⁶

The Study found serious and wide-ranging disturbances in *all* of the subjects. All 14 suffered head injuries during childhood, nine of the injuries were severe enough to result in hospitalization, indentation of the cranium, or loss of consciousness. Furthermore, the neurological and electroencephalographic data revealed that nine of the subjects had serious neurological abnormalities, including evidence of brain injury and electroencephalographic findings suggestive of a previously undiagnosed seizure disorder.³⁷

The Study also found that seven of the subjects were psychotic at the time of their evaluations and/or had been so diagnosed in earlier childhood. An additional four subjects displayed histories consistent with severe mood disorders. The three remaining subjects suffered from disturbed thinking, characterized by periodic

³⁴ *Id.* at 585.

³⁵ The mental status examination is a cross-sectional inventory of a patient's current behavior, symptoms, sensorium, and cognitive faculties. See Ginsberg, *Psychiatric History and Mental Status Examination*, in 1 *Comprehensive Textbook of Psychiatry* 487 (H. Kaplan & B. Sadock 4th ed. 1985).

³⁶ Lewis, Pincus, Bard, Richardson, Pritchep, Feldman & Yeager, *supra* note 33, at 585.

³⁷ *Id.*

paranoia. Thus, all 14 exhibited psychiatric disturbances. Seven suffered from psychiatric disturbances that first appeared in early or middle childhood.³⁸ In all cases, psychopathology antedated the crimes for which the subjects were sentenced to death.³⁹

The psychoeducational testing done in the Study further indicates that at least nine of the subjects experienced significant brain impairment and lacked the ability to formulate abstract concepts. Moreover, 12 subjects had I.Q. scores below 90.⁴⁰ The Study concludes that the majority of these individuals have serious deficiencies in abstract reasoning and function well below the expected levels for their ages.⁴¹

The Study reveals that these adolescent offenders had been repeatedly and brutally physically and sexually abused, often by more than one family member. Furthermore, alcoholism, drug abuse, psychiatric treatment and psychiatric hospitalization were prevalent in the histories of their parents.⁴²

The Study concludes that individuals condemned to death in the United States for crimes committed in their youth are multi-handicapped. They generally have suffered serious central nervous system injuries, have suffered since early childhood from psychotic symptoms, and have been physically and sexually abused. These significant disturbances inhibit natural development, exacerbate the existing vulnerabilities of youth, and contribute to the violent behavior demonstrated by these adolescents.⁴³

Furthermore, the physical and sexual abuse experienced by these adolescents contributes to their crimes. First, the multiple batterings suffered by these adolescents may have actually caused brain

³⁸ *Id.*

³⁹ Psychopathology refers to "disordered psychologic and behavioral functioning (as in a mental disease)." Webster's Third New International Dictionary 1833 (1968).

⁴⁰ An I.Q. score of 100 is considered average. A person with an I.Q. score below 90 falls into the bottom twenty-five percent of other individuals of the same age in the United States. See D. Wechsler, *The Wechsler Intelligence Scale for Children - Revised* 25 (1974); D. Wechsler, *The Wechsler Adult Intelligence Scale - Revised Manual* 27 (1980).

⁴¹ Lewis, Pincus, Bard, Richardson, Pritchep, Feldman & Yeager, *supra* note 33, at 585-86.

⁴² *Id.* at 586-87.

⁴³ *Id.* at 587-88.

injury which would result in increased impulsivity and volatility. Second, the severe parental violence that they experienced functioned as a model for their behavior. Third, the extreme, irrational brutality to which these adolescents were exposed engendered rage which was displaced onto other individuals in their environment.⁴⁴

Finally, the Study suggests that the multiple disturbances which contributed to the violent behavior that these adolescents displayed also contributed to the harshness of the sentences they received. According to the Study, these adolescents uniformly tried to hide evidence of their cognitive deficits and psychotic symptomatology.⁴⁵ Also, both they, and often their attorneys, tried to conceal or minimize their parents' brutality towards them.⁴⁶ It is ironic that the very factors which could function as mitigating circumstances instead remain hidden at the time of the sentencing. It is noteworthy that much of the clinical information revealed in this Study had apparently not been previously uncovered during the course of each individual adolescent's case. The Study reports that of these 14 subjects "in only five cases were any pretrial evaluations performed at all. These tended to be perfunctory and provided inadequate and inaccurate information regarding the adolescents' neuropsychiatric and cognitive functioning."⁴⁷ In sum, the clinical and legal services necessary to uncover and respond to the significant medical, psychological and social abnormalities suffered by adolescents on death row are simply unavailable.⁴⁸

B. Both Petitioners Exhibit the Same Characteristics as the Subjects of the Adolescent Death Row Study

Petitioner Heath Allen Wilkins is an extremely disturbed young person who has spent much of his life in various mental institutions.⁴⁹

⁴⁴ See *supra* notes 30-31 and accompanying text.

⁴⁵ Lewis, Pincus, Bard, Richardson, Pritchep, Feldman & Yeager, *supra* note 33, at 587-88.

⁴⁶ *Id.* at 588.

⁴⁷ *Id.*

⁴⁸ *Id.* at 589.

⁴⁹ It is very rare for a child to be psychiatrically hospitalized or placed in a residential treatment facility. For example, the National Institute of Mental Health reports that in 1980 only approximately 1 child in 1,000 was psychiatrically hospitalized and only approximately 3 children in 10,000 received residential treatment. NIMH, *Mental Health, United States* Pub. No. 85-1378 (C.A. Taube & S.A. Barrett eds. 1985).

(footnote continued)

(W.J.A. at 39-45; W. Tr. at 249-50.)⁵⁰ He has suffered from serious psychiatric and emotional disorders since early childhood. (W.J.A. at 68; W. Tr. at 272.) The record establishes that Heath has exhibited psychotic symptoms and bizarre behaviors throughout his adolescence and childhood. (W.J.A. at 43, 68; W. Tr. at 235.) His thinking has frequently been described as illogical, confused and paranoid. (W.J.A. at 40, 43, 47, 60, 61, 68.)⁵¹ Heath has been described as "borderline" or "schizotypal," and has been "diagnosed as suffering from schizophrenia." (W.J.A. at 40, 43, 50, 67-68.) Furthermore, Heath has required treatment with antipsychotic medications. (W.J.A. at 43, 59, 67.) In addition, Heath has suffered from severe depression since he was at least nine years old, leading him to make numerous suicide attempts. (W.J.A. at 46, 60; W. Tr. at 265.)

Heath's uncle introduced him to drugs while he was still in kindergarten. (W.J.A. at 29, 57; W. Tr. at 261.) Heath has abused alcohol and various drugs, including "gasoline, glue, pot, uppers and downers," since age five or six. (W.J.A. at 67.) In addition, he has used LSD quite frequently since age 10. (W.J.A. at 67.) Heath's history of severe drug abuse could only have exacerbated his deep-seated problems. Furthermore, the record indicates that Heath's drug abuse may very well have caused him to suffer serious neurological damage. (W.J.A. at 29.)

Both Heath's brother and his father also have a history of psychiatric illness. Heath's father was committed to a mental institution. (W.J.A. at 41.) His brother was also psychiatrically hospitalized and diagnosed as schizophrenic. (W.J.A. at 61.)⁵²

These forms of treatment are reserved for the most disturbed children in our society. Heath's extended institutionalization in such facilities demonstrates the severity with which his symptoms were regarded.

⁵⁰ References preceded by "W.J.A." are to the Wilkins Joint Appendix. References preceded by "W. Tr." are to the Wilkins trial transcript.

⁵¹ There is also evidence in the record that Heath experienced auditory and visual hallucinations (W.J.A. at 30.).

⁵² Severe mental illness in first degree relatives is significant because such psychotic disorders as schizophrenia tend to run in families and vulnerabilities to them are thought to be inherited. Weiner, *Schizophrenia: Etiology*, in 1 *Comprehensive Textbook of Psychiatry* 653, 655 (H. Kaplan & B. Sadock 4th ed. 1985). In fact, Heath's psychiatric records suggest that his illness may have a genetic component. (W.J.A. at 47.)

Heath's family environment was very chaotic, disturbed and destructive. His father left the family when Heath was very young. According to records, Heath's father was violent and abusive in the family. (W.J.A. at 41.) Heath was also abused by his mother and his mother's boyfriend. Heath's mother sometimes had violent outbursts that led her to beat Heath for two hours at a time. (W.J.A. at 28, 57; W. Tr. at 261.) Heath was also sexually abused. (W.J.A. at 31; W. Tr. at 261.) Heath's family was so lacking in support that in the weeks preceding the crime for which he was sentenced to death he was not allowed in the house by his mother and was essentially homeless and without any kind of adult support. (W. Tr. at 272.)

Thus, Heath has been exposed to a constellation of psychological, physical and environmental disturbances which have disrupted his natural growth and development. He has suffered from profound psychiatric, emotional and social limitations. Furthermore, Heath has been a victim of extreme abuse and neglect.⁵³ He is typical in every way of adolescents on death row as a group.⁵⁴ Under these circumstances, it shocks the conscience that Heath was permitted to waive counsel, represent himself and seek the death penalty. The death penalty in this case "only serves to bury and cover up the failures of our existing social and penal programs." *State v. Wilkins*, 736 S.W.2d 409, 423 (Mo. banc 1987) (Welliver, J. dissenting).

Petitioner Jose Martinez High also is similar to the adolescents on death row studied by Dr. Lewis and her colleagues.⁵⁵ Jose had apparently functioned adequately until the tenth grade when he suddenly failed everything. (H.H.C. Tr. at 57.)⁵⁶ He became possessed by certain fantasies, developed disciplinary problems and "seemed alienated from the entire adult world." (H.H.C. Tr. at 42, 58.) One of his teachers stated that "Jose may well have been profoundly and emotionally disturbed . . . with deeper problems than 95% of our students . . . [He] was desperate for

⁵³ See *supra* notes 24-32 and accompanying text.

⁵⁴ Lewis, Pincus, Bard, Richardson, Pritchep, Feldman & Yeager, *supra* note 33, at 588-89.

⁵⁵ *Id.*

⁵⁶ References preceded by "H.H.C. Tr." refer to the High State Habeas Corpus Transcript.

attention and definitely begging for psychological counseling." (H.H.C. Tr. at 60.) This dramatic change in Jose's behavior, as well as the observations of his teachers, suggest the onset of a psychiatric illness. Unfortunately no one was available to help Jose with his problems. (H.H.C. Tr. at 60.)

Within a mere two years of the onset of these psychological problems Jose committed the crime for which he has been sentenced to death. Jose has apparently never been afforded a comprehensive psychiatric and neurological evaluation. Without such an examination we do not know how closely Jose resembles the increasingly clear picture of death row inmates who committed capital crimes in their adolescence. Based on the limited record, however, and the nearly universal characteristics found in the juvenile death row study, *amici* believe that a complete and thorough examination of Jose High would likely reveal the same psychological, educational and environmental disturbances found in adolescents on death row as a group.⁵⁷

III

THE EXECUTION OF AN INDIVIDUAL WHO WAS UNDER AGE 18 AT THE TIME OF THE CAPITAL OFFENSE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT

The Eighth Amendment, which applies to the states through the Fourteenth Amendment, prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. This Court has determined that a punishment is "cruel and unusual" if it is excessive. *Weems v. United States*, 217 U.S. 349 (1910). It is excessive if it is disproportionate to the crime or to the individual's moral culpability for that crime, or if it makes no measurable contribution to acceptable goals of punishment. *Enmund v. Florida*, 458 U.S. 782, 800 (1982); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). A punishment is also impermissible if it offends society's "evolving standards of decency." *Trop v. Dulles*, 356 U.S. 86, 101 (1958)

⁵⁷ Lewis, Pincus, Bard, Richardson, Pritchep, Feldman & Yeager, *supra* note 33, at 588-89.

(plurality opinion); *Thompson v. Oklahoma*, ____ U.S. ____, 108 S. Ct. 2687, 2691 (1988) (plurality opinion).

Although the Court has determined that the death penalty is not inherently cruel in violation of the Eighth Amendment, *Gregg v. Georgia*, 428 U.S. 153 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.), it has recognized the extraordinary nature of the punishment:

[E]very Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense.

Spaziano v. Florida, 468 U.S. 447 (1984) (Stevens, Brennan and Marshall, JJ., concurring in part and dissenting in part) (collecting cases); see also *California v. Ramos*, 463 U.S. 992, 998-99 at n.9 (1983) (collecting cases). Indeed,

[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion) (footnote omitted).

The question raised herein is whether death is *ever* an appropriate punishment for an individual who was under the age of 18 at the time he or she committed a capital offense. The answer to this question must be *no*. The fundamental differences between adolescence and adulthood, distinctions universally recognized by the medical and social sciences, as well as the law, make this irrevocable form of punishment both excessive as applied to youths and offensive to contemporary standards of decency.

In determining whether the death penalty is a permissible punishment for a particular category of offenders, this Court must

consider the available objective indicators of contemporary standards of decency, such as legislative enactments and jury determinations. The analysis, however, does not stop there. This Court has consistently observed that "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Thompson v. Oklahoma*, 108 S. Ct. at 2692 n.8 (plurality opinion) (quoting *Coker v. Georgia*, 433 U.S. at 597). See also *Enmund v. Florida*, 458 U.S. at 797. In exercising that judgment here, this Court first must ask whether adolescents are sufficiently morally culpable to suffer the penalty of death, and then consider whether the application of the death penalty to adolescents measurably contributes to the social purposes ostensibly served by the death penalty. *Thompson v. Oklahoma*, 108 S. Ct. 2692 (plurality opinion). The answers to these two questions are informed by the teachings of psychiatrists, psychologists and other adolescent development experts. This Court must bring this body of knowledge to bear as it makes its own considered judgment regarding the constitutionality of capital punishment for adolescents.

A. Capital Punishment Is Cruel and Unusual As Applied to Adolescents Because Adolescents Lack the Requisite Moral Culpability

This Court has repeatedly recognized that the appropriateness of the death penalty depends upon the moral culpability of the offender or category of offenders. *Thompson v. Oklahoma*, 108 S. Ct. at 2698 (plurality opinion); *California v. Brown*, ____ U.S. ____, 107 S. Ct. 837, 840 (1987) (O'Connor, J., concurring) ("punishment should be directly related to the personal culpability of the criminal defendant"); *Tison v. Arizona*, ____ U.S. ____, 107 S. Ct. 1676, 1683 (1987). The vast body of clinical research and literature demonstrates that adolescents lack the experience, judgment, psychological development, and fully formed character of adults. Thus, adolescents cannot be equated with adults with respect to their eligibility for the death penalty. Capital punishment for adolescents is cruel and unusual because it is grossly out of proportion to adolescents' moral culpability.

The fact that a separate system of criminal justice has evolved for adolescents is ample evidence that the death penalty, as applied to adolescents, is disproportionate.

The very existence of a dual criminal justice system is evidence of a two-fold societal judgment that children do not bear the same degree of responsibility for their antisocial behavior as adults and therefore should not be subject to the harsh penalties of criminal trial and penal incarceration; and juvenile delinquents are, by virtue of their youth, responsive to rehabilitative treatment.⁵⁸

Inherent in the law are the basic beliefs that (i) youths should not be punished as severely as adults because they are not as culpable as adults for their offenses; and (ii) youths by nature are receptive to treatment and rehabilitation.

The disparate treatment of youth in the law is fully supported by the clinical evidence about adolescent development. As described in Point I, adolescents are still growing socially and psychologically. "Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult." *Thompson v. Oklahoma*, 108 S. Ct. at 2699 (plurality opinion). Furthermore,

adolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth.⁵⁹

⁵⁸ S. Fox, *The Juvenile Court: Its Context, Problems and Opportunities* 11-13 (1967).

⁵⁹ *Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime* 47 (1978). ("Task Force")

Thus, execution must be regarded as a disproportionate form of punishment as applied to adolescents. Their diminished responsibility for their acts justifies the added measure of tolerance that exists in the law. *Thompson v. Oklahoma*, 108 S. Ct. at 2698 (plurality opinion) ("[T]he Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult."). Because adolescents are not expected to conform their behavior to adult standards, it is inappropriate to inflict on them a form of punishment intended only for society's most serious and incorrigible offenders. The ability of adolescents to adjust and improve as they mature further demonstrates the inappropriateness of inflicting on adolescents the ultimate punitive sanction of death.

B. Capital Punishment Is Cruel and Unusual As Applied to Adolescents Because It Serves No Legitimate Penological Purpose

The death penalty ostensibly serves two acceptable goals of punishment: deterrence and retribution. *Thompson v. Oklahoma*, 108 S. Ct. at 2699 (plurality opinion); *Gregg v. Georgia*, 428 U.S. at 183 (joint opinion of Stewart, Powell, and Stevens, JJ.). Because inflicting the death penalty on youthful offenders makes no measurable contribution to either goal, its application to them is cruel and unusual punishment, "nothing more than the purposeless and needless imposition of pain and suffering." *Coker v. Georgia*, 433 U.S. at 592 (plurality opinion).

1. The Death Penalty Does Not Deter Adolescents From Committing Capital Offenses

In commenting upon the lack of empirical evidence to support or rebut the theory that capital punishment has a deterrent effect, Justice Stewart observed:

We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act.

Gregg v. Georgia, 428 U.S. at 185-86 (joint opinion of Stewart, Powell, and Stevens, JJ.). In light of what is known today about adolescent development generally and the development of adolescents who commit homicide in particular, adolescents are unlikely to engage in a meaningful "cold calculus that precedes the decision" to commit a capital offense in which "the possible penalty of death" enters into their decision-making process.

As described above, adolescents generally are more impulsive and less able to appreciate the consequences of their acts than adults. Adolescents also tend to lack a fully developed appreciation of death and its finality. Moreover, while adolescents may be capable of rational decision-making in some areas with the guidance and support of adults, this capacity is significantly lessened when they are placed under highly stressful circumstances.⁶⁰

Such circumstances are abundant with respect to homicidal adolescents. These adolescents typically grow up in a chaotic family environment, are exposed to violence and abuse throughout their childhood, and tend to be impeded in their natural development by the adults upon whom they must rely for protection and support. They also suffer from cognitive limitations which further impair their ability to make sound judgments. These factors are particularly damaging during adolescence because it is at this stage of development that human beings are especially vulnerable and awkward. While adolescents may look like and possess many of the physical attributes of adults, they do not yet think or behave like adults. The violent nature of adolescents who kill is a predictable consequence of the combination of (i) their incomplete human development which has been further hindered by an unstable and violent childhood, and (ii) the rapid physical changes which they are undergoing.

It is thus demonstrably wrong to conclude that the death penalty deters adolescents who commit capital offenses. Adolescents

⁶⁰ In sum, although some youths' involvement in delinquency may be related to cost-benefit decisions and to a rational process, other explanations better explain the delinquent behavior of most youths. With the vast majority of youngsters, delinquent behavior arises without much forethought as they interact with their environment. With still other youths, compulsive behavior, the influence of alcohol or drugs, or intense emotional reaction to a situation seem to lead them to bypass any rational process. C. Bartollas, *Juvenile Delinquency* 102 (1985); see also P. Hahn, *The Juvenile Offender and the Law* 40-57 (2d ed. 1978) (free will and rational choice not among various behavioral theories explaining the causes of delinquency).

generally do not engage in any "cold calculus" that would factor in the possibility of a death sentence before they act homicidally. *Thompson v. Oklahoma*, 108 S. Ct. at 2700 (plurality opinion) ("The likelihood that the teenage offender has made the kind of cost/benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent."). Emotionality, coupled with a pronounced inability to appreciate or be affected by the knowledge of the consequences of their actions, leads adolescents to commit capital offenses. Free will and rational calculation are generally absent in these circumstances.

2. Retribution Is Not a Legitimate Penological Purpose With Respect to Adolescents

The penological goal of retribution has two components: (1) the desire that offenders suffer the punishment they deserve, and (2) the desire for vengeance. See *Gregg v. Georgia*, 428 U.S. at 183-184 (joint opinion of Stewart, Powell, and Stevens, JJ.). Whether these concerns are satisfied is again contingent upon the degree of the offender's responsibility for the offense. "The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison v. Arizona*, 107 S. Ct. at 1683. "Given the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to its children," *Thompson v. Oklahoma*, 108 S. Ct. at 2699 (plurality opinion), the retribution rationale is simply inapplicable to the execution of adolescents.

Adolescents, like adults, should pay for their crimes. However, "[t]he juvenile justice system, while holding minors responsible for their misconduct . . . acknowledges that the level of juvenile responsibility is lower than for adults."⁶¹ It is thus excessive to inflict the penalty of death on adolescents.

Neither of the concerns of retribution is satisfied by executing youthful offenders. The punishment of death is too severe because adolescents are not as responsible as adults. In addition, the disparate legal treatment of adolescents is ample evidence that society is less vengeful with respect to youthful offenders.

Retribution is also contrary to the principal legitimate purpose of punishing the young: rehabilitation. Traditional methods of

⁶¹ Task Force at 47.

punishing youthful offenders are based upon a presumption that young persons are more amenable to positive change than adults. In fact, this presumption is well-documented. Consequently, the finality and irrevocability of the death penalty makes such punishment manifestly inappropriate for adolescents.

a. Adolescents Are Less Responsible Than Adults For Their Offensive Acts

Adolescents are developmentally different from adults in ways that diminish their level of responsibility for their actions. Point I documents the inexperience, impulsiveness and emotionality of youth. Adolescents have a greater tendency than adults to act in disregard of the potentially serious and harmful consequences of their acts. Even when they are aware of such consequences, they are more prone than adults to act in spite of them.

[T]he American adolescent, struggling with the biological and psychological pressures of youth, seeks status and reassurance in the company of his peers. Rebellion against parental authority and restrictions is combined with pressure to conform to the expectations of other adolescents. The teen years are a period of experiment, risk taking and bravado. Some criminal activity is part of the patterns of almost all youth subcultures.⁶²

This Court has taken note of these developmental distinctions, observing that "minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Bellotti v. Baird*, 443 U.S. at 635. See *Thompson v. Oklahoma*, 108 S. Ct. at 2699 (plurality opinion). This fundamental concept of youth forms the basis for state laws which commonly prohibit minors from possessing alcohol in public, from voting, from sitting on a jury, and from marrying without parental consent.

[T]he experience of mankind, as well as the long history of our law, recognize[s] that there are differences which must be accommodated in determining the rights and duties of children as compared with those of adults. Examples of this distinction abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and to hold office.

Goss v. Lopez, 419 U.S. 565, 590-91 (1975) (Powell, J., dissenting) (emphasis in original). It also justifies disparate treatment for

⁶² *Id.* at 3.

adolescents under the First,⁶³ Fourth,⁶⁴ and Fourteenth⁶⁵ Amendments. This same concept of youth also warrants less severe punishment. See *supra* at 20-21.

Furthermore, as shown in Point II, adolescents who commit capital offenses are even less responsible for their acts than adolescents generally. Such adolescents tend to lack the support and protection ordinarily provided youths by parents and other family members. In addition, their families are frequently violent and abusive. These factors are further aggravated by psychiatric problems from which homicidal adolescents frequently suffer. As a result of these factors, the natural maturation process is seriously inhibited. The emotional growth and development of adolescents who are homicidal is, in effect, stunted.

The death penalty is thus too severe a punishment for adolescent offenders. Because an adolescent has not yet fully developed emotionally and psychologically, and because an adolescent who commits a capital offense tends to be even more developmentally limited, the execution of such an individual is by definition a greater punishment than he or she deserves.

⁶³ *E.g.*, *Ginsberg v. New York*, 390 U.S. 629, 638 (1968) (state law forbidding sale of sexually explicit but non-obscene material to persons under 17 years of age does not violate First Amendment because "even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults,' ") (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)).

⁶⁴ *E.g.*, *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (schoolchild's Fourth Amendment right against unreasonable search and seizure and his legitimate expectation of privacy must give way to school's legitimate need to maintain appropriate educational environment).

⁶⁵ *E.g.*, *Schall v. Martin*, 467 U.S. 253 (1984) (state law authorizing preventative detention of accused juvenile delinquents does not violate their Fourteenth Amendment rights if serious risk of subsequent crime exists, because, although juveniles' liberty interest is strong under Fourteenth Amendment, juveniles, unlike adults, require some form of custody).

Notably, in *Schall* the Court observed:

Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*. In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's "*parens patriae*" interest in preserving and promoting the welfare of the child."

Id., at 265 (quoting *Santosky v. Kramer*, 455 U.S. 745, 766 (1982)).

b. Vengeance Is Antithetical to the Lawful Treatment of Adolescents

Society's moral obligation to protect its young is indisputable. As Justice Frankfurter observed in *May v. Anderson*, 345 U.S. 528, 536 (1953) (concurring opinion): "Children have a very special place in life which law should reflect. Legal theories . . . lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." Youth and its inherent characteristics — immaturity, vulnerability, inexperience and dependency — place the concept of revenge at odds with the lawful treatment of the young. Thus,

[t]he spectacle of our society seeking legal vengeance through execution of a child raises fundamental questions about the nature of children's moral responsibility for their actions and about society's moral responsibility to protect and nurture children.⁶⁶

As described *supra* at 24, youths are defined as less responsible for their acts by state legislatures and the courts. In addition to a host of both legislatively and judicially imposed restraints on the rights and liberties of adolescents, both state and federal laws provide distinct rules and procedures for the prosecution of youths. Under both state and federal law, many acts which constitute crimes if committed by adults instead constitute acts of "juvenile delinquency" if committed by adolescents. See, e.g., *State In Interest of D.B.S.*, 137 N.J. Super. 371, 349 A.2d 105 (1975).

Society's responsibility to protect and nurture the young is also well supported by legal precedent. This obligation is perhaps best reflected in the Court's longstanding recognition of the guiding role parents play in the upbringing of children.⁶⁷ In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court held that although a state's interest in compulsory education for its children is indeed strong, it must give way to parents' "traditional interest" in raising children. *Id.*

⁶⁶ Streib, *Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen*, 36 Okla. L. Rev. 613, 637 (1983).

⁶⁷ Constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. at 166.

at 214. Similarly, when it comes to deciding whether a child is to be committed to a state mental hospital, the Court has stated that it is up to the parents to decide, notwithstanding the child's clear "liberty interest" not to be confined without due process.

The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. . . . *Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments.*

Parham v. J.R., 442 U.S. 584, 602-603 (1979) (emphasis supplied).

Vengeance cannot therefore serve as a legitimate penological goal with respect to adolescents — even adolescents who commit capital offenses. The diminished culpability of adolescents, coupled with society's obligation to protect the young, warrants a measure of constitutionally imposed tolerance sufficient to bar their execution.

c. Retribution Is Contrary to Rehabilitation, the Principal Legitimate Goal of Punishing Adolescents

Retribution is contrary to rehabilitation, which is the primary goal of punishing the young. E.g., *In the Matter of the Appeal in Maricopa County, Juvenile Action No. J-84536-S*, 126 Ariz. 546, 617 P.2d 54, 56 (1979) ("the most deeply rooted concept in juvenile court philosophy is that the purpose of the system is to rehabilitate and not to punish"); *Rust v. Alaska*, 582 P.2d 134 (Alaska 1978) (express purpose of juvenile jurisdiction is rehabilitation rather than punishment). The reason for this objective is not hard to discern: "[I]ncorrigibility is inconsistent with youth . . . it is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life." *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968).

The existence of a juvenile justice system under both state and federal law which treats youthful offenders more leniently than adults demonstrates the importance society places on the goal of rehabilitation with respect to adolescents.⁶⁸ For example, the purpose

⁶⁸ See generally A. Platt, *The Child Savers: The Invention of Delinquency* (2d ed. 1977); Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 Stan. L. Rev. 1187 (1970); Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104 (1909).

of the Federal Juvenile Delinquency Act, 18 U.S.C §§ 5031-5042 (West 1985), "is to be helpful and rehabilitative rather than punitive . . ." *United States v. Hill*, 538 F.2d 1072, 1074 (4th Cir. 1976). Under the Act, "a juvenile is accorded preferential and protective handling not available to adults accused of committing crimes." *United States v. Frasquillo-Zomosa*, 626 F.2d 99, 101 (9th Cir.), *cert. denied*, 449 U.S. 987 (1980).

Greater tolerance toward youthful offenders is justified by their heightened capacity for change, growth and improved behavior. As described *supra* at 7, adolescents are generally more receptive and responsive to rehabilitative treatment. More specifically, "juvenile murderers tend to be model prisoners and exhibit a very low rate of recidivism when released."⁹⁰ Putting adolescents to death is therefore without any legitimate penological justification.

C. The Execution of Adolescents Is Unconstitutional in Light of Contemporary Human Knowledge About Adolescents Generally and Adolescents Who Commit Capital Offenses in Particular

This Court has consistently recognized that "it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty" on a particular category of offenders. *Thompson v. Oklahoma*, 108 S. Ct. at 2698 (plurality opinion) (quoting *Enmund v. Florida*, 458 U.S. at 797). The "broad, vague terms [of the Eighth Amendment] do not yield to a mechanical parsing . . ." *Thompson v. Oklahoma*, 108 S. Ct. at 2698 n.40 (plurality opinion).

Thus, Eighth Amendment analysis is "flexible and dynamic." *Gregg v. Georgia*, 428 U.S. at 171 (joint opinion of Stewart, Powell, and Stevens, JJ.). Whether the infliction of a particular punishment is inherently cruel and unusual is subject to periodic review, which must give due consideration to "contemporary human knowledge." *Robinson v. California*, 370 U.S. 660, 666 (1962). Contemporary human knowledge respecting adolescent development generally and the nature of adolescents who commit capital offenses in particular indicates that the ultimate sanction of death is an inappropriate form of punishment for such persons for the reasons described herein.

⁹⁰ Streib, *The Eighth Amendment and Capital Punishment of Juveniles*, 34 Cleve. St. L. Rev. 363, 395 (1987) (citing Vitiello, *Constitutional Safeguards for Juvenile Transfer Procedure: The Ten Years Since Kent v. United States*, 26 De Paul L. Rev. 23, 32-34 (1976)); D. Hamparian, R. Schuster, S. Dinitz & J. Conrad, *The Violent Few* 52 (1978); T. Sellin, *The Penalty of Death* 102-20 (1982).

The developmental differences between adolescents and adults are alone sufficient to justify a constitutional ban on the execution of individuals who commit capital offenses while under the age of 18. It is offensive to contemporary standards of decency to commit to death individuals who, because of their lack of maturity, exist in the law as persons who are incapable of making legally binding decisions in certain matters and who are often accorded disparate treatment for acts which would be regarded as criminal if they were adults. The reason for these distinctions is clear: Youths "cannot be judged by the more exacting standards of maturity." *Haley v. Ohio*, 332 U.S. 596, 599 (1948). These same distinctions justify a degree of leniency in the manner in which adolescents who commit capital offenses are punished. The ultimate punitive sanction of death is just too harsh.

However, the analysis need not end there. As shown in Point II, youths who commit capital offenses typically suffer from a variety of serious natural and environmental disabilities. In addition to exhibiting all of the attributes which make youths vulnerable by nature, adolescents who kill are deficient intellectually, emotionally, psychologically and frequently neurologically. Their impairment is aggravated by parents or legal guardians who fail to provide much needed support at a critical stage in their lives, and indeed, who typically provide negative influences. The individuals on death row who were minors when they committed capital offenses exhibit these deficiencies.⁹¹

The execution of persons who commit homicide while under the age of 18 is therefore far more offensive as actually applied than it is in the abstract as applied to the universe of adolescents. The commission of a homicide by an adolescent is a reflection of a multitude of serious and complex problems from which the adolescent suffers. Such youths almost invariably have been deprived of a stable, healthy environment in which to develop. Nor could they rely upon adults to exercise rational judgment on their behalf. Most significantly, however, the law has provided them little practical recourse. Adolescents who commit homicide are legally subject to the will of and reliant upon adults who typically contribute substantially to the adolescents' impairment.

⁹¹ It is no response to say that all these factors are considerations that can be introduced as mitigating evidence at the penalty phase of a capital trial under *Lockett v. Ohio*, 438 U.S. 586 (1978), and its progeny. Clearly *Lockett* was an insufficient check inasmuch as these individuals were sentenced to death despite their substantial impairment.

The most fundamental concepts of fairness are thus implicated by the execution of persons who have committed homicide in their adolescence. They lack not only the maturity necessary to be accorded the full panoply of civil rights and liberties afforded adults, but also the protective support and guidance from responsible adults who are legally authorized to impose their will upon them. The death penalty should not therefore be inflicted on adolescents because it is cruel and unusual punishment and excessive as applied to them.

CONCLUSION

The execution of individuals who committed capital offenses while under the age of 18 is inherently cruel and unusual in violation of the Eighth Amendment. Therefore, this Court should vacate petitioners' death sentences, and remand their cases for the imposition of life sentences.

Respectfully submitted,

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